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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-13

BLEVINS POPCORN COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

AMERICAN FEDERATION OF GRAIN MILLERS, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AMERICAN FEDERATION OF GRAIN MILLERS, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Blevins Popcorn Company respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this matter on May 4, 1977.

OPINIONS BELOW

The final Judgment of the Court of Appeals is unreported (infra, Pet. App. A, pp. A1-A2). The Order and Decision of the National Labor Relations Board is reported at 218 NLRB No. 101, 89 LRRM 1637 (infra, Pet. App. F, pp. A8-A19).

JURISDICTION

The Judgment of the Court of Appeals was determined on the 31st day of January, 1977 (infra, Pet. App. E, pp. A7-A8). A duly filed Petition for Rehearing was denied on April 4, 1977 (infra, Pet. App. D, p. A6). The judgment of the Court of Appeals was entered on May 4, 1977 (infra, Pet. App. A, pp. A1-A2). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board in its supervision of union elections may sanction procedures that cast their weight for the choice of a union and against a non-union shop.

2. Whether the National Labor Relations Board erred in overruling objections to the union election.

3. Whether material misrepresentations of fact which were disseminated immediately prior to holding the election destroyed the laboratory conditions required.

(A) Where an agent of the union advised employees that the company was paying its portion of

the hospitalization insurance premiums out of the employees' own pension fund and profit sharing funds.

(B) Where an agent of the union prepared a written collective bargaining contract and advised employees that its provisions would *automatically* go into effect, if the union won the election.

(C) Where an agent of the union assured free employee hospitalization insurance in exchange for the workers' votes.

4. Whether the promise of financial inducements to employees destroyed the laboratory conditions necessary for a valid election.

5. Whether the block challenging of employee ballots and the offer to purchase votes created an atmosphere of confusion and fear that destroyed the laboratory conditions necessary for a valid election.

6. Whether interference caused by three company supervisors destroyed the laboratory conditions necessary for a valid election.

7. Whether the Court is required to consider the cumulative effect of misconduct in assessing interference with the laboratory conditions necessary for a valid election.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151, *et seq.*), are as follows:

Section 2(11)

Section 7 Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Section 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

Section 8(b)

Section 8(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, *if such expression contains no threat of reprisal or force or promise of benefit.*

Section 9(c)(1)(A)

Section 9(d)

Section 10(c) and (d)

Section 10(e) The findings of the Board with respect to questions of fact if supported by substantial evidence *on the record considered as a whole* shall be conclusive.

Section 10(f)

REGULATION INVOLVED

The pertinent portion of 29 CFR § 102.69(a) and (c) as follows:

Section 102.69 Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing. (a) . . . Within 5 days after the tally of ballots has been furnished, any party may file with the regional director four copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served upon each of the other parties by the party filing them, and proof of service shall be made.

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election or if the challenged ballots are sufficient in number

to affect the result of the election, the regional director shall investigate such objections or challenges, or both. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer.

STATEMENT OF FACTS

On September 17, 1973, the American Federation of Grain Millers, AFL-CIO (hereinafter called the "Union") filed a representation petition with the National Labor Relations Board (hereinafter called the "Board"), seeking the right to serve as the exclusive bargaining representative of Blevins Popcorn Company employees located at a production facility in Ridgway, Illinois. Thereafter, the parties agreed and entered into a Stipulation for Certification upon Consent Election, and on November 2, 1973, an election was held and conducted by the Board in the stipulated unit.[1]

On November 8, 1973, Blevins Popcorn Company (hereinafter called the "Company") filed timely Objections to conduct affecting the results of this election (infra, Pet. App. G, Exhibit 1, pp. A43-A44). Thereafter, the Regional Director for Region Fourteen of the Board conducted an *ex parte* administrative investigation, and on December 17, 1973 issued his Report on Objections and Recommenda-

1. The stipulated unit being "all production and maintenance employees including truck drivers employed at the employer's facility in Ridgway, Illinois but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act."

tions (infra, Pet. App. G, pp. A20-A43), finding the Company's Objections to be without merit and recommending that they be overruled in their entirety.

Thereafter, the Company timely filed Exceptions to the Regional Director's Report on Objections and Recommendations, which resulted in the Board ordering a hearing limited only to determine the supervisory status of three individuals whose alleged conduct was asserted to be objectionable; all other issues raised by the Company in its Objections to the conduct affecting the results of the election were not thereafter considered; e.g., no hearing afforded.

On October 30, 1974, the Board issued a Decision and Certification of Representative adopting the Hearing Officer's recommendation that the issues raised in the limited hearing be overruled and, in effect, certifying the union as the freely chosen exclusive representative of these employees.

As is procedurally required under the statute (Section 10(e) and (f)), the Company refused to bargain with or recognize the Union so as to seek appeal and judicial review of issues raised concerning the conduct of this election. On June 19, 1975, the Board issued its Decision and Order, 218 NLRB No. 101, granting the General Counsel's Motion for Summary Judgment and finding the Company's refusal to bargain to be violative of Sections 8(a)(5) and (1) of the National Labor Relations Act, as amended (hereinafter called the "Act").[2] The Board's

2. The Company, in response to a Notice to Show Cause Why General Counsel's Motion for Summary Judgment Should Not Be Granted, alleged and asserted as newly discovered and previously unavailable evidence the unrebutted fact that those individuals designated in the record as "low level supervisors" had subsequently engaged in and supported a strike effort brought by the Union against the Company's facilities; it was submitted that this additional supervisory support for the Union demonstrated the merit of the Company's Objections to this election.

Order further affirmatively required the Company to recognize and bargain with the Union, upon request.

Subsequently, the Union caused a Petition to be filed before the United States Court of Appeals for the District of Columbia Circuit in Case No. 75-1611 to review the part of the Board's Order that denied additional relief previously requested by the Union. (Issues raised by the Union before the Court of Appeals are not raised by this Petition.) A Petition for Enforcement of the Board's Order, as is permitted pursuant to Section 10(e) of the Act was also filed before the United States Court of Appeals for the District of Columbia Circuit, styled as Case No. 75-1748. Thereafter, upon consolidation, the Union was permitted to stand as Intervenor in this case.

An initial Order of the Court of Appeals issued on January 31, 1977 (infra, Pet. App. E, pp. A7-A8). In substance, the Order stated that the Board's findings are supported by substantial evidence and free from legal error. However, no opinion or memorandum was submitted. The Company timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc on February 11, 1977, asserting in part that this Court of Appeals standard of judicial review of Board cases remains the same as that defined thirty-seven years ago, which does not respond to the direction of Congress in its 1947 amendments to the Act, nor conform to standards of other United States Courts of Appeals, nor specifically to direction of this Honorable Court.

On April 4, 1977, the Court of Appeals denied the Company's Petition for Rehearing, and on the same date, denied a Suggestion for Rehearing En Banc, with Circuit Judge MacKinnon's statement he would grant the Company's Suggestion for Rehearing En Banc (infra, Pet. App. C, p. A5). Thereafter, the Board filed a proposed Judgment

pursuant to Rule 19 of the Federal Rules of Appellate Procedure, which was approved and Judgment entered on May 4, 1977. It is from this Judgment that Blevins Popcorn Company prays that a Writ of Certiorari issue, so as to permit an adequate review of the standards utilized by this United States Court of Appeals in considering Board cases and other issues as hereinafter stated.

REASONS FOR GRANTING THE WRIT

1. The United States Court of Appeals for the District of Columbia Circuit has rendered a decision in conflict with the decisions of other Courts of Appeals on the same subject matter.

2. The United States Court of Appeals for the District of Columbia Circuit has decided a federal question in a way in conflict with applicable decisions of the Supreme Court of the United States.

3. The United States Court of Appeals for the District of Columbia Circuit has not modified its standard for judicial review of Board cases to that in conformity with other United States Courts of Appeals or as directed by Congress and this Honorable Court; said circumstances require and call for an exercise of this Court's power of supervision.

ARGUMENT

In 1973, Mr. Justice Douglas delivered the opinion of this Court, wherein it was stated:

> "The Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union and against a non-union shop or for a non-union shop and against a union." *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.S. 270, 94 S.Ct. 495, 84 LRRM 2929 (1973).

Essential to the Court's direction in that case was the holding that:

> "Any procedure requiring a 'fair' election must honor the right of those who oppose the union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice. By Section 7 of the Act employees have the right not only to 'form, join, or assist' unions but also the right 'to refrain from any and all of such activities'." 84 LRRM at page 2932.

Additionally, this Court noting that Section 8(c) prohibited dissemination of any views, arguments or opinions that contained a "promise of benefit" concluded that:

> "The right of free choice is, however, inherent in the principles reflected in Section 9(c)(1)(A) of the Act."

Since 1973 this has been, and is, the judicial standard required in evaluating Board conducted elections. The United States Court of Appeals for the District of Columbia Circuit has failed to be responsive to this Court's direction.

A diligent review of the reported decisions that have issued from the United States Court of Appeals for the District of Columbia Circuit appears to disclose that it has

never found a union agent's misrepresentation or misconduct to be a basis for setting aside a Board conducted election. There appears to be a basis for this unusual circumstance and "precedent" maintained by this Court of Appeals.

Although no memorandum or full opinion issued from the Court of Appeals in this case, it appears the judicial standard of review that this Court of Appeals, as opposed to other United States Courts of Appeals, utilizes in its review of Board conducted election cases can best be defined and seen in *N.L.R.B.* v. *Mar Salle, Inc.*, 138 U.S.App. D.C. 135, 425 F.2d 566, 73 LRRM 2517 (1970), wherein the Court of Appeals below states:

> "We recognize therein that that 'control of the election proceeding, and the determination of the steps necessary to conduct that election fairly (are) matters which Congress entrusted to the Board alone'." Citing as authority for such a judicial standard this Court's decision made in 1940 of *N.L.R.B.* v. *Waterman Steamship Company*, 309 U.S. 206, 5 LRRM 682 (1940).

The Petitioner submits that the law has been substantially altered since 1940. No longer are issues raised in an election proceeding to be the determination of ". . . the Board alone". *Waterman Steamship Company*, ibid., at page 226.

During the first twelve years of its existence, the National Labor Relations Board was subjected to sustained criticism from various political and other organizations. There were two criticisms which were more generally accepted as valid. First, the Board was accused of an undue bias in favor of labor, particularly since it initiated the very cases it was to decide. Second, critics charged that

the alleged bias of the Board denied due process, since it prevented fair investigations, hearings and decisions.

In 1940, the minority report on certain proposed amendments to the National Labor Relations Act then under consideration by the Committee on Labor of the United States House of Representatives stated:

> "Justly or unjustly, the consensus of public opinion is that the Board is biased, prejudiced, and has been guilty of not only grabbing and using power never delegated to it by the Act, but that it has been unfair and unjust in its actions." H. Rep. No. 1928, Part 3, 76th Cong., 3rd Sess. 10 (April 12, 1940).

This criticism was repeated by the Committee on Education and Labor of the House in its Report on Labor-Management Relations Act, 1947 (the Taft-Hartley Act), where it stated that "the Committee's investigation, as well as those of preceding Congresses have shown bias and prejudice is rampant in the Board's staff and among some members of the Board itself". H. Rep. No. 245, 80th Cong., 1st Sess. 26 (April 11, 1947).

Congressional criticism of the Board was so substantial that there were no less than 230 important bills introduced to modify the Wagner Act, which ultimately resulted in the passage of the Taft-Hartley Bill on June 23, 1947. See, Millis and Brown, *From the Wagner Act to Taft-Hartley*, 294, 333 (1950). Also consider, Reilly, *The Legislative History of the Taft-Hartley Act*, 29 Geo. Wash. L. Rev. 285 (1960).

Congressional action in 1947 superseded the exclusive Board mandate to determine elections fairly. Among those changes incorporated in the Labor Management Relations Act of 1947 were that (1) certain unfair labor practices by unions including union coercion of workers were pro-

hibited; (2) except under certain restrictions the closed shop was outlawed; (3) supervisors were removed from coverage of the Statute; (4) employees were given the right to refrain from union activities; (5) the rights of free speech were extended; however, both employers as well as unions were proscribed from promising benefits in representation elections; and (6) significantly the standards of proof and review were modified in both Sections 10(e) and (f) of the Act, 61 Stat. 146-150. The latter modification was judicially defined by this Court in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 27 LRRM 2373 (1951).

Although patently it would appear that the Court of Appeals below invoked this standard required by the Court and Congress (infra, Pet. App. E, p. A8), the results of the lower opinion, in fact, rest on the judicial standards previously identified in *Mar Salle, Inc.*, supra; that being, in substance, that the determination of fair elections is to be left ". . . to the Board alone". Thus, the United States Court of Appeals for the District of Columbia Circuit continues to render decisions in conflict with Congressional mandate, the Supreme Court of the United States and in conflict with other Courts of Appeals on the same subject matter.

For examples of a union agent's dissemination of trickery and misrepresentation of that resulting in a promise of a benefit consider the decisions of the following United States Courts of Appeals.

First Circuit

N.L.R.B. v. *Gorbea, Perez and Morell*, 328 F.2d 679, 681-682, 55 LRRM 2586 (CA-1, 1964). Please note, Circuit Judge Aldrich's analysis of the Board's asserted "distinction" between those election activities that are "merely

a prediction" as compared to that constituting an illegal "promise". As stated:

> "We are not impressed with this distinction. Unless one is willing to say that employers are all-powerful and unions ineffectual, a representation by a union that it will obtain higher wages is both a promise and a prophecy, and a representation by an employer to the contrary is precisely the same. The difference, it seems to us, is simply that the law regards the union's representation as proper and the employer's as improper. So far as the effectiveness of the representation is concerned, however, we see no reason why employees should regard one as consequential and the other not.
>
> "By the same token, since a penny saved is a penny earned we have difficulty in seeing why a $10 bribe to join the union is septic, cf. Teletype Corp., supra, while a promise to waive a 'regular' $25 initiation fee is benign because there is a contingency. It is true, as the Board says, that a contract may not be signed, and that even if one is signed it may not require present employees to join the union. But so, too, an employer may not succeed in keeping its promise not to raise wages if a union gets in." 55 LRRM at page 2587.

Also consider, *N.L.R.B.* v. *Trancoa Chemical Corp.*, 303 F.2d 456, 50 LRRM 2407 (CA-1, 1962), enforcement of the Board order was denied where the union distributed exaggerated and false negotiated union contracts. The same subject matter and result is also found in *N.L.R.B.* v. *Millard Metal Service Center, Inc.*, 472 F.2d 647, 82 LRRM 2345 (CA-1, 1973).

Second Circuit

Henderson Trumbull Supply Corp. v. *N.L.R.B.*, 501 F.2d 1228, 86 LRRM 3121 (CA-2, 1974). Enforcement denied where union asserted the Company "had been making a great deal of money through you and your fellow employees" two days before the election was held.

Third Circuit

Aircraft Radio Corp. v. *N.L.R.B.*, 519 F.2d 590, 89 LRRM 3060 (CA-3, 1975), enforcement denied where union's deliberate and calculated dissemination of misstatements about the employer's earnings, profits and fringe benefits occurred on eve of Board conducted election. Please note the approval of this Court of Appeals for the holding aforementioned in *Savair Manufacturing Co.*, supra.

Fourth Circuit

Electronic Components Corp. v. *N.L.R.B.*, ... F.2d ....., 93 LRRM 2280 (CA-4, 1976), enforcement denied, union pre-election activities involving coercion and dissemination of false financial information about company. Also consider, *Collins & Aikman Corporation* v. *N.L.R.B.*, 383 F.2d 722, 66 LRRM 2280 (CA-4, 1967), involving union caused unreasonable and excessive economic inducements to voters. See also, *N.L.R.B.* v. *Bonnie Enterprises, Inc.*, 341 F.2d 712, 58 LRRM 2395 (CA-4, 1965).

Fifth Circuit

Tyler Pipe Industries, Inc. v. *N.L.R.B.*, 447 F.2d 1136, 77 LRRM 2416 (CA-5, 1971); prior opinion at 406 F.2d 1272, 70 LRRM 2739 (CA-5, 1969). Union's deliberately false dissemination asserting that company was economically exploiting its wage earners. Also consider, *N.L.R.B.*

v. *Houston Chronicle Publishing Company*, 300 F.2d 273, 49 LRRM 2782 (CA-5, 1962); *Home Town Foods, Inc.* v. *N.L.R.B.*, 379 F.2d 241, 65 LRRM 2681 (CA-5, 1967), accord *Home Town Foods, Inc.* v. *N.L.R.B.*, 416 F.2d 392, 71 LRRM 2663 (CA-5, 1969); *N.L.R.B.* v. *Laney & Duke Company*, 369 F.2d 859, 63 LRRM 2552 (CA-5, 1966); *N.L.R.B.* v. *O. K. Van Storage, Inc.*, 297 F.2d 74, 49 LRRM 2218 (CA-5, 1961); *N.L.R.B.* v. *Southern Foods, Inc.*, 434 F.2d 717, 75 LRRM 2788 (CA-5, 1970); *Pepperell Manufacturing Company* v. *N.L.R.B.*, 403 F.2d 520, 69 LRRM 2679 (CA-5, 1968); *N.L.R.B.* v. *Bill's Institutional Commissary Corp.*, 418 F.2d 405, 72 LRRM 2782 (CA-5, 1969); *National Cash Register Company* v. *N.L.R.B.*, 415 F.2d 1012, 72 LRRM 2051 (CA-5, 1969); and *S. H. Kress & Company* v. *N.L.R.B.*, 430 F.2d 1234, 75 LRRM 2064 (CA-5, 1970).

Sixth Circuit

Argus Optics v. *N.L.R.B.*, 515 F.2d 939, 89 LRRM 2280 (CA-6, 1975); enforcement denied. Therein Circuit Judge McCree adopted the standards of the aforecited *Henderson Trumbull Supply Corp.*, supra, and *Tyler Pipe Industries, Inc.*, supra, decisions, as well as that standard imposed by the Ninth Circuit Court of Appeals in *N.L.R.B.* v. *G. K. Turner Associates*, 457 F.2d 484, 79 LRRM 2932 (CA-9, 1972), where it is stated that:

> "Misrepresentation about company profitability can be material, since the extent to which the employees share equitably in the products of their labor may be of great interest to them." 457 F.2d at 488 (Enforcement denied).

Note also, *Lake Odessa Machine Products* v. *N.L.R.B.*, 512 F.2d 762, 88 LRRM 3164 (CA-6, 1975), wherein it is stated:

> "It is our conclusion that the representations made by the union in the handbills misrepresented the facts,

> and were deliberately dishonest, and made at the last moment before the election with the intention that the voters would rely on them as being truthful and, upon this reliance, vote against the employer." (Enforcement denied).

Seventh Circuit

N.L.R.B. v. *Janler Plastic Mold Corp.*, ... F.2d ..... (or not officially reported), 82 LRRM 2174 (CA-7, 1972), enforcement denied where union organizer stated:

> "That if the union won all employees would receive $120 per week sickness benefits, non-contributory hospitalization insurance and shop insurance for tools."

The Seventh Circuit relied on Board precedent expressed in *Zarn, Inc.*, 170 NLRB 1135, 67 LRRM 1549 (1968); *Hollywood Ceramics Company*, 140 NLRB 221, 51 LRRM 1600 (1962). Other forms of campaign trickery utilized in Board elections are also proscribed by this Circuit in *N.L.R.B.* v. *John S. Barnes Corp.*, 478 F.2d 1105, 83 LRRM 2052 (CA-7, 1973). See also, *Allis-Chalmers Manufacturing Co.* v. *N.L.R.B.*, 261 F.2d 613, 43 LRRM 2246 (CA-7, 1958).

Eighth Circuit

J. I. Case Company v. *N.L.R.B.*, Slip Opinion No. 76-1183, dated May 18, 1977, 95 LRRM 2480 (CA-8, 1977), enforcement denied. This Circuit relying on *Universal Camera Corp.*, supra, and *N.L.R.B.* v. *Griffith Oldsmobile, Inc.*, 455 F.2d 867, 79 LRRM 2650 (CA-8, 1972) and other authority of the various United States Courts of Appeals states:

> "While considerable deference should be accorded to the Board's findings in these cases, this court none-

theless has the responsibility for assuring that the Board keeps within reasonable grounds."

And that more specifically:

> "Promises are often written on the wind, but statements of fact are the stuff upon which men and women make serious value judgments. In the context of an election, rank and file employees must largely depend upon the company and the union to provide the data on which the arguments pro and con are based. If either side departs substantially from the truth, that side must accept the consequences, if the misrepresentation, whether or not intended, could reasonably be expected to affect significantly the outcome of the election." (95 LRRM at page 2482).

Ninth Circuit

N.L.R.B. v. *G. K. Turner Associates*, 457 F.2d 484, 79 LRRM 2932 (CA-9, 1972), enforcement denied. Where in reference to the company's pension plan, the union agent stated:

> "Just try and get your money out. There is nothing in writing to make the company give it to you. If they don't want to give you the money, they don't have to and there is nothing you can do about it."

This Court of Appeals relying on other authorities cited herein states its judicial function as follows:

> "The courts review election conduct to determine whether it inhibited the employees' free choice in selecting their bargaining representative." *Gallenkamp Stores Company* v. *N.L.R.B.*, 404 F.2d 525, 69 LRRM 2024 (CA-9, 1968).

See also, assertions of union agent in *N.L.R.B.* v. *Winchell Processing Corp.*, 451 F.2d 306, 78 LRRM 2929 (CA-9, 1971).

The undersigned has been unable to find any reported decisions issued by the United States Court of Appeals for the District of Columbia Circuit wherein a union agent's misrepresentations or promise of a benefit involving campaign trickery or the like permitted denial of the Board's Order. The Board's own Chairman, Fanning, reports that statistics presented by the Office of General Counsel reflect that some 300 to 400 cases per year on the issue of objections to a Board conducted election based on misrepresentation must be considered by this Federal Agency. *Shopping Cart Food Market*, 228 NLRB No. 190, 94 LRRM 1705, at page 1710.[3]

Based on these statistics, this Petitioner urges that the issues raised by this Writ have a significant impact on national labor policy, as well as the administration of Board conducted elections generally, and the aforementioned conflict among the various United States Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits to that of the United States Court of Appeals for the District of Columbia Circuit.

It is suggested that Petitioner's point herein is best stated by the United States Court of Appeals for the Seventh Circuit in *Celanese Corporation* v. *N.L.R.B.*, 291 F.2d 224, 48 LRRM 2406 (CA-7, 1961), cert. denied, 368 U.S. 925, 49 LRRM 2173 (1961), wherein it is stated:

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3. Please realize, to illustrate the vacillation of legal standards on misrepresentation cases before the Board, that this recent holding dated April 8, 1977 expressly overrules the Board's longstanding mandates expressed in *Hollywood Ceramics Co.*, 140 NLRB 221, 51 LRRM 1600 (1962).

"In interpreting this section, *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 27 LRRM 2373 (1951), admonishes the Courts of Appeals of their duties in reviewing Labor Board orders. The courts are to assume more responsibility for the reasonableness and fairness of Board decisions than some courts have previously shown. . . . Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board.

"Unless or until Congress changes the language of the statute or the Supreme Court changes its interpretation of the application of the statute, this court is bound by the rule of the *Universal Camera* case.

"On oral argument counsel for the Board took the position that the scope of review by Courts of Appeals of orders of the Board as to representation elections was extremely narrow and that the Board's orders should not be set aside unless clearly arbitrary or capricious. Counsel could not think of an example of extreme arbitrariness or capriciousness which, in his opinion, would warrant setting aside an order. This position is far from the interpretation placed on the statute by the United States Supreme Court in the *Universal Camera* case."

Please be advised that the Petitioner is not unmindful that this dispute affects the rights of the men and women employed in the geographical jurisdiction of the Seventh Circuit; said company's facility being located in Ridgway, Illinois.

THE RECORD BELOW

It remains uncontested between the adversary parties in this cause that certain evidentiary findings are reflected in the Board's Regional Director's Report on Objections which were subsequently adopted by the Board and which identify and define that conduct which is asserted to have interfered with the election (infra, Pet. App. G, pp. A20-A43). The Company has timely and properly asserted that certain deliberate and calculated misrepresentations were made by the American Federation of Grain Millers International Representative, Anderson, on the evening immediately before this election was held.

A. Union Last Minute Misrepresentation That Employees' Hospitalization Insurance Was Being Paid Out of Their Own Pension and Profit Sharing Funds.

Following an *ex parte* investigation, the Board's Regional Director states:

"With respect to the allegation that International Representative Anderson advised employees that the employer was paying its portion of hospitalization insurance premiums out of the employees' pension fund and profit sharing fund, one witness stated in a sworn statement that he 'definitely got the impression that Anderson was telling the employees that he knew for certain the Company was doing this, rather than, he thought they "might" be doing it'. A second witness testified in a sworn statement that International Representative Anderson stated:

'You all think you are getting your hospitalization insurance free, but they are paying their portion

out of the pension fund and profit sharing fund.' " (Regional Director's Report on Objections, page 3; infra, Pet. App. G, p. A24).

This Petitioner asserts that not only is such a misrepresentation substantial, but that the Regional Director's Findings are "material", because of the extent to which employees share equitably in the products of their labor is of great interest to them. *The Halsey W. Taylor Co.*, 147 NLRB 16, 56 LRRM 1139 (1964). The statement of International Representative, Anderson, when simply considered, is that the Company was providing free hospitalization insurance for these men and women by stealing from their own profit sharing and pension funds.

B. The Assurance That the Union's Contract Would Automatically Go Into Effect, If It Won the Election.

It is uncontroverted that the record and the Board's investigation disclosed as follows:

> "With respect to the allegation that Petitioner's International Representative Anderson showed the employees a contract which he had prepared and advised that it would *automatically* go into effect if the Petitioner won the election, the investigation disclosed that prior to, and during, the Petitioner's organizational meeting on November 1, Anderson caused to be typed a contract showing the Employer and Petitioner as parties therein. At the meeting, Anderson read the provisions of this contract to the employees. Two employee witnesses state that in their 'estimations', Anderson stated that the contract would *automatically* go into effect if the Petitioner won the election, however, they could not recall the statement in detail." (Regional Director's Report on Objections, pages 4, 5; infra, Pet. App. G, p. A25).

The Union's "promise" of the wage and other economic benefits contained in Anderson's deliberately constructed collective bargaining contract has an even more profound effect on the voters than the singular promise of a gift of life insurance coverage, as is prohibited by the Board's own existing policy. See, *Wagner Electric Corporation*, 167 NLRB No. 75, 66 LRRM 1072 (1967), wherein it was determined:

> "In contrast, the gift of immediate life insurance coverage is a tangible, economic benefit and is most unusual. It is our view that a gift of life insurance coverage to the prospective voters is more akin to employer's grant of a wage increase in anticipation of a representation election than it is to a waiver of union initiation fees and that it subjects the donees to a constraint to vote for the donor union. In that connection it is noted that coverage was *automatic* and required no physical examination or medical report. We conclude that by such a gift, the Petitioner destroyed the atmosphere which the Board seeks to preserve in its elections in order that the employees may exercise freedom of choice on representational questions. Accordingly, we shall set aside the election and direct that a second election be held." (66 LRRM at page 1073).

This principle of labor law has been judicially adopted by the United States Supreme Court in the matter of *N.L.R.B.* v. *Savair Manufacturing Company*, 414 U.S. 270 (1973), wherein the union's gift of waiver of employee initiation fees was based and conditioned upon the outcome of the election and, of course, remains objectionable interference with the election process. The *per curiam* opinion of this Court of Appeals does not disclose why the

principles of *Wagner Electric Corp.*, supra, and that of the Supreme Court in *Savair Manufacturing Company*, supra, are to be ignored in the record submitted by this cause.

C. The Union's Assurance of Free Employee Hospitalization Insurance in Exchange for the Workers' Vote.

The Petitioner, again relying on the Report of the Board's Regional Director, sets out his uncontested findings and conclusions:

> "With respect to International Representative's Anderson's alleged promise of free hospitalization insurance, one employee witness stated in a sworn statement, that his recollection of such a discussion, was that during one of the three organizational meetings, he is not certain which meeting, he 'heard Anderson speak of free hospitalization insurance by saying that the premium cost would be deducted from our dues or something, I'm not sure I understood this'. A second witness stated that he recalls Anderson stating that the employees 'would definitely get' free hospitalization insurance in addition to other contract provisions promised if the Petitioner (Union) won the election." (Regional Director's Report on Objections, page 7; infra, Pet. App. G, p. A29).

The promise of "free" *anything* for an employee's vote by either management or labor, clearly exceeds the area of permissible electioneering. *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405, 55 LRRM 2098 (1964). Unless this United States Court of Appeals condones a "double standard", it is certain that an employer can no more promise to give a forthcoming wage increase than can a union promise that the employees would "definitely get" free hospitalization insurance as payment for the workers' support in elections conducted by the National Labor Relations Board. Specifically, the Union's efforts were to deliberately engage in misrepresented assertions concerning the Company's financial dealings with the employees' own profit sharing and pension funds, and then further, to promise to "buy the votes" of these men and women; observe, Section 8(c) of the Act.

D. Other Acts of Union Interference.

This Petition, because of its required brevity, cannot adequately define or set out other deliberate acts of interference, coercion and trickery subjected upon the employees immediately before the election was conducted by the Board. However, the record in this matter does contain testimony concerning direct monetary payments to prospective voters, worker retaliation and interference brought by "low level supervisors", and the Union's blanket voiding of over ten percent of the eligible workers through the process of "challenged ballots".[4] The Petitioner submits that the record discloses that this remained a nasty, illegal and profoundly unfair election held among these men and women that should not be judicially approved in the *per curiam* opinion of this Court of Appeals. Such a result would not occur before the other Circuits, and, therefore, remains in conflict.

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4. The Union challenged the votes of all eight "truck drivers" out of a total of 67 cast at the election.

CONCLUSION

This Honorable Court has previously observed that:

> "If the union or employer is to be permitted to take action which substantially—though unintentionally—encourages or discourages union activity, the union or employer ends served by the action must not only be of some significance, but they must also be legitimate, or at least not otherwise forbidden by the National Labor Relations Act." *Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667, 47 LRRM 2906 (1961).

This Petitioner submits the Union's activities were neither "legitimate" nor permitted by the Act, 29 U.S.C. § 158(c). Clearly, this Honorable Court has directed that:

> "We think the reversal of the Board *on the facts* by the Court of Appeals was within the scope of review entrusted to it." (Emphasis supplied), citing *Universal Camera Corp.*, supra, 340 U.S. at 490-491; *N.L.R.B.* v. *News Syndicate Co.*, 365 U.S. 695, 47 LRRM 2916 (1961).

In *Universal Camera Corp.*, supra, appellate judicial responsibility is defined:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to

> enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." 340 U.S. at 490.

The standard of requisite judicial review can best be observed in the Court's companion case to that pronouncement made in *Universal Camera Corp.*, supra, of *N.L.R.B.* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 71 S.Ct. 453, 27 LRRM 2382 (1951), where the Court of Appeals originally took one position concerning the Board order, and thereafter, under the standards imposed by newly enacted legislation reversed, this Court observing:

> "The Court of Appeals has now held, in accordance with our own view, that the scope of review had been extended 'beyond the requirements of the Wagner Act'. 180 F.2d 731, 736, 25 LRRM 2428, and that in the light of the new requirements the record considered as a whole disentitled enforcement of the order." 340 U.S. at 500.

The United States Court of Appeals for the District of Columbia Circuit, in conflict with the decisions of other Courts of Appeals, on the same subject matter, did not, nor has not, utilized the standard of judicial review required by this Court and by Congress. As was stated by the chief proponent of the 1947 amendments to this Act, Senator Taft explained:

> "In the first place, the evidence must be substantial; in the second place, it must still look substantial when viewed in the light of the entire record. That does not go so far as saying that a decision can be reversed on the weight of the evidence. It does not go quite so far as the power given to a circuit court of appeals to review a district-court decision, but it goes a great deal further than the present law, and gives the court greater opportunity to reverse an obviously unjust decision on the part of the National Labor Relations Board." 93 Cong. Rec. 3955, reprinted in 2 Legislative History 1014.

The "entire record" including that set out above was not considered by the lower Court of Appeals, which results in judicial approval of ". . . an obviously unjust decision on the part of the National Labor Relations Board".

For the foregoing reasons, this Petition for Writ of Certiorari should be granted, so as to permit a full and complete consideration of the issues raised by this cause.

Respectfully submitted,

BRACKHAHN & BROOKE
RICHARD A. BRACKHAHN
Suite 300, The Conwood Building
813 Ridge Lake Boulevard
Memphis, Tennessee 38138
Attorney for Petitioner

Dated: June 29, 1977

CERTIFICATE

I, Richard A. Brackhahn, attorney for Petitioner, Blevins Popcorn Company, hereby certify that I have directed and caused, pursuant to Rule 33 of the Rules of the Supreme Court of the United States, forty (40) copies of said Petition for Writ of Certiorari to be filed, air mail postage prepaid, on the Clerk of the Supreme Court of the United States, and that appropriate copies of said Petition have been served on the following:

Solicitor General of the United States (3)
Washington, D. C. 20530

National Labor Relations Board (3)
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20570

Mr. Joseph H. Solien (1)
Regional Director
National Labor Relations Board
Region 14
Room 448, 210 North 12th Boulevard
St. Louis, Missouri 63101

Charles Orlove, Esq. (3)
Jacobs, Burns, Sugarman & Orlove
201 North Wells Street, Suite 1900
Chicago, Illinois 60606

Mozart G. Ratner, Esq. (1)
1900 M Street, N. W., Suite 610
Washington, D. C. 20006

RICHARD A. BRACKHAHN

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1611

AMERICAN FEDERATION OF GRAIN MILLERS,
AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 75-1748

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BLEVINS POPCORN COMPANY,
Respondent.

and

AMERICAN FEDERATION OF GRAIN MILLERS,
AFL-CIO,
Intervenor.

JUDGMENT

(Filed May 4, 1977)

Before: Wright, Tamm, and Leventhal, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of American Federation of Grain Millers, AFL-CIO, to

review an order of the National Labor Relations Board issued against Blevins Popcorn Company on June 19, 1975, and upon the application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on January 18, 1977, and has considered the briefs and transcripts of the record filed in this cause. On January 31, 1977, the Court being fully advised in the premises, handed down its decision denying the petition for review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Blevins Popcorn Company, Ridgeway, Illinois, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

/s/ J. Skelly Wright
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ Edward Allen Tamm
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ Harold Leventhal
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1976

No. 75-1611

American Federation of Grain Millers, AFL-CIO,
Petitioner

v.

National Labor Relations Board,
Respondent

Blevins Popcorn Co.,
Intervenor

No. 75-1748

National Labor Relations Board,
Petitioner

v.

Blevins Popcorn Company,
Respondent

American Federation of Grain Millers,
Intervenor

BEFORE: Wright, Tamm and Leventhal, Circuit Judges

ORDER

(Filed April 29, 1977)

Upon consideration of the motion of the National Labor Relations Board for leave to file a proposed judgment pursuant to Rule 19, Federal Rules of Appellate Procedure, time having expired, it is

ORDERED by the Court that the motion of the National Labor Relations Board is granted, and the Clerk is directed to file its proposed judgment and to submit the proposed judgment to the Court for its approval.

Per Curiam
For the Court:
George A. Fisher
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

No. 75-1748

National Labor Relations Board,
Petitioner

v.

Blevins Popcorn Company,
Respondent

American Federation of Grain Millers,
Intervenor

BEFORE: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

ORDER

(Filed April 4, 1977)

Upon consideration of the suggestion for rehearing *en banc* of respondent Blevins Popcorn Company, and a majority of the Judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED by the Court, *en banc*, that the aforesaid suggestion for rehearing *en banc* is denied

Per Curiam
For the Court:
George A. Fisher
Clerk

Circuit Judge MacKinnon would grant respondent's suggestion for rehearing *en banc*.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1976

No. 75-1748

National Labor Relations Board,
Petitioner

v.

Blevins Popcorn Company,
Respondent

American Federation of Grain Millers,
Intervenor

BEFORE: Wright, Tamm and Leventhal, Circuit Judges

ORDER

(Filed April 4, 1977)

Upon consideration of the petition for rehearing filed by respondent Blevins Popcorn Company, it is

ORDERED by the Court that respondent's aforesaid petition for rehearing is denied.

Per Curiam
For the Court:
George A. Fisher
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
[No Opinion]

September Term, 1976

No. 75-1611

AMERICAN FEDERATION OF GRAIN MILLERS,
AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

No. 75-1748

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

BLEVINS POPCORN COMPANY,
Respondent

AMERICAN FEDERATION OF GRAIN MILLERS,
AFL-CIO,
Intervenor

Petition to Review and Cross-Application to Enforce an Order of the National Labor Relations Board.

Before: WRIGHT, TAMM, and LEVENTHAL, Circuit Judges.

ORDER

(Filed January 31, 1977)

These causes came on to be heard on a petition to review and a cross-application to enforce an order of the

National Labor Relations Board and were argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

The Board's findings are supported by substantial evidence in the record taken as a whole. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951). This court also finds that the Board's order is otherwise free from legal error.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the petition for review is hereby denied, and the cross-application for enforcement is hereby granted.

Per Curiam
For the Court
/s/ George A. Fisher
George A. Fisher
Clerk

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 14-CA-8237

BLEVINS POPCORN COMPANY

and

AMERICAN FEDERATION OF GRAIN MILLERS, AFL-CIO

DECISION AND ORDER

(Dated June 19, 1975)

Upon a charge filed on November 7, 1974, by American Federation of Grain Millers, AFL-CIO, herein called the

Union, and duly served on Blevins Popcorn Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 14, issued a complaint on November 20, 1974, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint, and notice of hearing were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on October 30, 1974, following a Board election in Case 14-RC-7468 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about November 4, 1974, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On November 26, 1974, Respondent filed its answer to the complaint and thereafter a first amended answer to the complaint on March 18, 1975, admitting the factual allegations thereof, but asserting that the certification of the Union in the underlying representation case was erroneous, essentially for the reasons stated in that proceeding. Respondent admits refusing to bargain upon request, and

1. Official notice is taken of the record in the representation proceeding, Case 14-RC-7468, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1957); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

asserts, *inter alia*, that individuals involved in the representation case were "supervisors" within the meaning of the Act and that they engaged in, supported, and encouraged employees in a labor dispute involving Respondent, thereby supporting its contentions raised by its objections to the election in the representation proceeding.

On March 18, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, asserting that by its answer to the complaint Respondent is attempting to raise issues which were raised and litigated in the representation proceeding, and thus he is entitled to judgment without hearing in the absence of any dispute as to factual issues. Subsequently, on March 31, 1975, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response and answer to Notice To Show Cause. The Union has also submitted a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

As noted above, in its answer and first amended answer, Respondent admits all the factual allegations of the complaint, but asserts that the Union's actions prior to the election prevented a free and fair expression of choice therein, and thus the certification of the Union was improper. By this argument, which Respondent essentially reiterates in its response to the Notice To Show Cause,

Respondent is attempting to raise and relitigate issues which were raised and extensively litigated[2] in the underlying representation proceeding.

In addition to reasserting its representation case contentions, Respondent alleges as newly discovered and previously unavailable evidence that those individuals alleged to be supervisors in that proceeding engaged in a labor dispute and supported and encouraged employees in derogation of their rights under the Act, all of which demonstrates merit in its objections to the election. We fail to see the relevance, in this proceeding, of any alleged conduct subsequent to the election together with their fellow employees, especially in view of the fact that they were found in that proceeding to be employees within the meaning of the Act.[3]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

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2. Respondent raised its contention regarding the Union's alleged preelection conduct, and, *inter alia*, issues concerning the alleged supervisory status of three employees, in its objections to the election. The Regional Director issued a report and recommendations thereon on December 17, 1974, recommending that they be overruled *in toto*. Upon Respondent's exceptions, in which these issues were presented to the Board, the Board ordered a hearing on Respondent's objection dealing with the alleged supervisory status of certain individuals. After the hearing, the Hearing Officer issued a report recommending that the objection be overruled, and finding that the individuals in question were not supervisors. Upon Respondent's exceptions, the Board issued a Decision and Certification of Representative on October 30, 1974, adopting his recommendations and certifying the Union.

3. Fn. 2, *supra*.

4. See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.[5]

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is a Tennessee corporation which is duly authorized to do business under the laws of the State of Illinois. It maintains a facility in Ridgeway, Illinois, which is the only facility involved herein, where it is engaged in the manufacture, sale, and distribution of popcorn and related products. During a representative period, Respondent, in the course and conduct of its business operations, manufactured, sold, and distributed at its Ridgeway, Illinois, place of business products valued in excess of $50,000, of which products valued in excess of $50,000 were shipped from said place of business directly to points located outside the State of Illinois.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer

5. We do not find Respondent's refusal to bargain herein to be "patently frivolous," as urged by the Union, and accordingly shall not order that Respondent reimburse the Union for its costs and fees as requested by it. *Heck's, Inc.*, 215 NLRB No. 142 (1974).

engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

American Federation of Grain Millers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including truckdrivers employed at the Employer's facility in Ridgeway, Illinois, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On November 2, 1973, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 14, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on October 30, 1974, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about November 1, 1974, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about November 4, 1974, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since November 4, 1974, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that

it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Blevins Popcorn Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. American Federation of Grain Millers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including truckdrivers employed at the Employer's facility in Ridgeway, Illinois, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the

purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 30, 1974, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about November 4, 1974, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Blevins Popcorn Company, Ridgeway, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with American Federation of Grain Millers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees, including truckdrivers employed at the Employer's facility in Ridgeway, Illinois, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Ridgeway, Illinois, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon

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6. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C., June 19, 1975.

Howard Jenkins, Jr., Member
Ralph E. Kennedy, Member
John A. Penello, Member
(Seal) National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with American Federation of Grain Millers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all em-

ployees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees, including truckdrivers employed at the Employer's facility in Ridgeway, Illinois, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

Blevins Popcorn Company
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 210 North 12th Boulevard, Room 448, St. Louis, Missouri 63101, Telephone 314-425-4167.

APPENDIX G

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

Case No. 14-RC-7468

BLEVINS POPCORN COMPANY
Employer

and

AMERICAN FEDERATION OF GRAIN MILLERS, AFL-CIO
Petitioner

REGIONAL DIRECTOR'S REPORT ON OBJECTIONS AND RECOMMENDATIONS

(Dated December 17, 1973)

Pursuant to a petition filed on September 17, 1973,[1] and a Stipulation for Certification Upon Consent Election, executed by the parties and approved by the Regional Director on September 27, an election was conducted on November 2, among the employees of the Employer in the following-described appropriate collective-bargaining unit:

> All production and maintenance employees including truckdrivers employed at the Employer's facility in Ridgeway, Illinois, but EXCLUDING office clerical employees, professional employees, guards and supervisors as defined in the Act.

The tally of ballots served upon the parties at the conclusion of the election discloses the following results:

1. All dates herein are in the year 1973 unless otherwise specified.

Approximate number of eligible voters	67
Void ballots	0
Votes cast for Petitioner	41
Votes cast against participating labor organization	18
Valid votes counted	59
Challenged ballots	8
Valid votes counted plus challenged ballots	67

Challenges are not sufficient to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has been cast for Petitioner.

Timely Objections to Conduct Affecting the Results of the Election were filed by the Employer on November 8.[2]

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the Regional Director has caused a full and complete investigation to be made of the objections. By letter dated November 8, the Board Agent assigned to investigate the objections requested that the Employer furnish the names and addresses of all witnesses who are expected to give testimony in support of the objections, a brief description of such expected testimony, and all documentary evidence in support of the objections. Pursuant to such request, the Employer, by letter dated November 12, submitted the names and addresses of witnesses expected to give testimony with respect to the objections and a brief description of such testimony. All evidence submitted by the parties, including sworn statements of witnesses, documentary evidence and the parties' respective statements of position have

2. A copy of the Employer's Objections is attached hereto and marked as Exhibit 1.

been fully and carefully considered by the undersigned who reports thereon and recommends as follows:

The Objections

Background

The Employer is a Tennessee corporation engaged in the production and distribution of popcorn and related products at its Ridgeway, Illinois, facility. At the time of the representation election conducted herein, there were approximately 67 employees in the production and maintenance unit. Plant Manager Charles McQuire provides overall supervision for the Employer's facility and Production Manager Charles Lee is in charge of production.

Objections 1, 2 and 7

In its first objection, the Employer alleges the Petitioner made misleading and substantial misrepresentations of fact to employees during union meetings immediately before the election at a time that precluded an effective reply by the Employer. Specifically, the Employer contends that during an organizational meeting held on November 1, Petitioner's International Representative Walter Anderson engaged in the following conduct: (a) Advised employees that the Employer was paying its portion of the hospitalization insurance premiums out of the employees' pension fund and profit-sharing fund and that such conduct misrepresented the Employer as being in violation of the law; (b) Advised employees that they did not have to fear strikes because he had only experienced three in his career; and (c) Showed employees a contract which he had prepared, and advised them that it would automatically go into effect if the Petitioner won the election.

Inasmuch as Employer's Objections 2 and 7 allege objectionable conduct similar to that contained in Item (c)

of Objection 1, Objections 2 and 7 shall be considered herein together with Item (c) of Objection 1.

In its second objection, the Employer alleges that Petitioner, through its agents and representatives, misrepresented the contents and substantive terms of American Federation of Grain Miller's contracts, which terms were within the knowledge of the Union, thereby interfering with the conduct of the election. Although inartfully expressed, the Employer does not contend that the Union misrepresented the terms of its various contracts with employers, rather that representatives and agents of the Petitioner other than International Representative Anderson, advised employees that if Petitioner won the election the employees would automatically receive the same provisions of union contracts. In support of Objection 2, the Employer alleges that in addition to International Representative Anderson other Union representatives and its supervisory employees William Lynch, Ernest Lynch and Robert Thrasher[3] showed employees copies of contracts and advised employees that if the Petitioner won the election the employees would automatically receive the same provisions.

In its seventh objection, the Employer alleges that the Union "constructed a written contract and represented to the employees that its terms and conditions would be automatically given to employees, if they voted for the Union."

The Petitioner denies the allegations contained in Objections 1, 2 and 7, and contends that these objections, as well as those which follow, lack merit.

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3. Contrary to the Employer, William Lynch, Ernest Lynch, and Robert Thrasher contend they are non-supervisory employees as will be discussed below herein.

With respect to the allegation that International Representative Anderson advised employees that the Employer was paying its portion of the hospitalization insurance premiums out of the employees' pension fund and profit-sharing fund, one witness stated in a sworn statement that he "definitely got the impression that Anderson was telling the employees that he knew for certain that the Company was doing this, rather than, he thought they 'might' be doing it." A second witness stated in a sworn statement that International Representative Anderson stated:

> You all think you are getting your hospitalization insurance free but they are paying their portion out of the pension fund and profit-sharing fund.

A third witness stated in a sworn statement that his "distinct impression of what he (Anderson) said was that he was advising the employees that he 'suspected' or 'thought' that the Company was doing that, rather than, he 'knew they were' doing that." Other witnesses interviewed who were present at the November 1 meeting denied hearing such a statement.

Assuming *arguendo* that the statement attributed to International Representative Anderson were made, the statement could readily be recognized and evaluated by the employees as campaign propaganda and not based upon facts within any special knowledge of Petitioner and does not provide a basis to set the election aside. *Hollywood Ceramics Company, Inc.*, 140 NLRB 221.

With respect to International Representative Anderson advising the employees that they did not have to fear strikes because he had only experienced three in his career, witnesses interviewed recalled that strikes were discussed. Eight employee witnesses state, in their sworn statements, that International Representative Anderson advised the employees that he "did not favor strikes". Three employee witnesses state that Anderson advised that he had only experienced "three" strikes in his career and three other witnesses state that Anderson advised that he had only experienced "a few" strikes. One employee witness states that in response to a movie shown at an earlier date by the Employer, which movie depicted another employer who experienced 37 strikes, Anderson stated that to his (Anderson's) knowledge this other Employer had only experienced three strikes in the last year.

Thus, the investigation establishes that, although Anderson may have made some statement to the employees with respect to the number of strikes he had experienced, and although this information may have been incorrect, the undersigned concludes that Anderson's comments do not constitute a material misrepresentation, nor did they have any significant impact on the election.

With respect to the allegation that Petitioner's International Representative Anderson showed the employees a contract which he had prepared and advised them that it would automatically go into effect if the Petitioner won the election, the investigation disclosed that prior to, and during, the Petitioner's organizational meeting on November 1, Anderson caused to be typed a contract showing the Employer and Petitioner as parties therein. At the meeting, Anderson read the provisions of this contract to the employees.

Two employee witnesses state that in their "estimations", Anderson stated that the contract would automatically go into effect if the Petitioner won the election, however, they could not recall the statement in detail. Nine other witnesses, in sworn statements, deny any recollection of such promise, but rather, state that Ander-

son presented the contract to the employees as a "proposed contract" that would necessarily have to be negotiated with the Employer. In addition, two of the witnesses interviewed, stated that the employees continued, on many occasions during the course of all of the Petitioner's organizational meetings, to press International Representative Anderson into "promising" that employees would receive provisions contained in the contract, but that Anderson continuously stated that he could not promise anything.

With respect to the allegation that Petitioner's representatives other than International Representative Anderson advised employees that if the Petitioner won the election, the same provisions would automatically go into effect, eight witnesses were interviewed. The investigation disclosed there were four organizational meetings held during the critical period from September 17, the date the petition was filed and November 2, the date of the representation election. Present during these four meetings, were four officials of the Petitioner who were also employed by employers other than the Employer involved herein. These officials discussed, in response to employees' questions, various provisions of their contracts. All eight witnesses interviewed stated in sworn statements that although they recall the officials discussing the provisions of their respective contracts, they did not recall them telling the employees that if the Petitioner won the election, the provisions would automatically go into effect for the employees.

With respect to the conduct of employees alleged to be supervisors, the investigation established that one employee stated that Thrasher approached him at his job location, showed him a union contract for an employer other than the Employer involved herein and discussed the provisions of this contract with him. The employee witness

does not state that Thrasher indicated the contract would automatically go into effect if Petitioner won the election. Thrasher concedes that he obtained such contract and kept it at the Employer's facility for 1 workday but he denies showing the contract to any employees. The investigation failed to disclose evidence of similar conduct by other alleged supervisory employees. Accordingly, this allegation is not supported by the evidence.

The investigation disclosed that the Employer during the election campaign preceding the election provided each employee with a booklet entitled "For Your Information". Stated therein in pertinent part:

> Q. The union tells us that with a union we'll get everything we have now plus more. Is this true?
>
> A. NO. Bargaining on a union contract does not start with the present benefits. All present benefits are wiped out and are as much a subject of negotiation as are demands for additional benefits. A union may trade present benefits for automatic deduction of dues from pay checks. You may end up with less in terms of wages and benefits, in addition to being required to pay initiation fees, dues and perhaps even assessments.
>
> Q. Won't I get more money from the company if a union wins the elections?
>
> A. NO. No union can force the company to do anything, and benefits would depend not only on the company's ability to pay, but on the company's bargaining strength in giving nothing or as little as possible.
>
> Q. If the union wins the election, will the company *automatically* have to sign a union contract? [Emphasis supplied]

A. Absolutely NOT. The company does not have to sign any contract that it does not feel is in the good interest of its business. There is no law that forces the company to agree with the demands of the union.

Q. Won't the union get us more besides what we already have? What have we got to lose?

A. NOT NECESSARILY—negotiations are a give and take proposition. Unions have been known to swap off benefits you may already have in order to get a dues checkoff—The Company would have the right to start negotiations at the *lowest rock bottom possible* and you can be sure we would fight for every cent. You could lose if the union swaps out or if negotiations fail and you lose time during a strike. [Emphasis in original]

Assuming *arguendo* that the Petitioner and agents of the Petitioner advised employees that the contract would automatically go into effect if it won the election, such does not exceed the bounds of privileged campaign propaganda, as employees are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining. *The Smith Company,* 192 NLRB 1098; *Southern Foods, Inc.,* 171 NLRB 999.

Accordingly, the undersigned recommends that Objection 1 in its entirety, Objection 2 and Objection 7 be overruled.

Objection 3

In its third objection, the Employer alleges that the Petitioner made financial inducements to the employees by guaranteeing free insurance and other benefits to em-

ployees. Specifically, the Employer contends: (a) that Petitioner's International Representative Anderson, promised the employees free hospitalization insurance; and (b) that the Petitioner, through its agents and representatives, paid money to employees to vote for it.

The Petitioner denies the allegations contained in Objection 3.

With respect to International Representative's Anderson's alleged promise of free hospitalization insurance, one employee witness stated in a sworn statement, that his recollection of such a discussion, was that during one of three organizational meetings, he is not certain which meeting, he "heard Anderson speak of free hospitalization insurance by saying that the premium cost would be deducted from our dues or something, I'm not sure I understood this." A second witness stated that he recalls Anderson stating that the employees "would definitely get" free hospitalization insurance in addition to the other contract provisions promised if the Petitioner won the election. Six witnesses stated, in sworn statements, that Anderson did not promise free hospitalization insurance, and another witness denied, in a sworn statement, hearing discussion of free hospitalization insurance. Five witnesses stated in sworn statements that Anderson discussed free hospitalization insurance as one of the provisions in the contract which would be proposed to, and negotiated with, the Employer, if the Petitioner won the election. One witness, presented by the Petitioner, stated in a sworn statement that Anderson read, verbatim, the hospitalization insurance provision contained in the contract prepared on November 1 during the organizational meeting as follows in pertinent part:

Section VI. Hospitalization and Insurance.

1. The Company agrees to pay the entire cost of a hospitalization program, including sickness and accident, to be negotiated.

2. After thirty days of employment with the company, each employee shall become eligible for and entitled to life insurance paying a death benefit of $2000.00 with all premiums payable by the company.

3. The Company agrees to maintain their present profit sharing program and make it available to all regular employees.

In these circumstances, the evidence does not establish that Anderson promised the employees free insurance, but rather that free insurance was discussed as a future contract proposal to be made by the Petitioner to the Employer. The discussion of possible contract proposals does not provide any basis upon which an election may be set aside. *The Smith Company, supra.*

With respect to the allegation that Petitioner, through its agents and representatives, paid money to employees to vote for it, the Petitioner denies doing so. The Employer failed to present, and the investigation failed to adduce any evidence that employees were paid or offered money to vote for or support the Petitioner. This allegation, therefore, is not supported by any evidence.

Accordingly, it is recommended that Objection 3 be overruled in its entirety.

Objection 4

In its fourth objection, the Employer alleges that the Petitioner, through its agents and representatives, immediately before the election, "announced the challenging

of ballots of" truckdrivers, thereby creating confusion and interfering with the conduct of the election. The Employer contends that the truckdrivers were challenged because they were not expected to vote for the Petitioner.

The Petitioner admits that the truckdrivers stationed at Shawneetown, Illinois were challenged, but maintains that they were challenged on the basis that the truckdrivers are not in the unit and not because they were expected to vote against the Petitioner. In the Stipulation for Certification Upon Consent Election, the Petitioner and the Employer agreed that truckdrivers employed at the Employer's Ridgeway, Illinois, facility were appropriately included in the unit. Petitioner states that when it agreed to the inclusion of truckdrivers, it had reference to one driver who presently works at the Employer's Ridgeway, Illinois, facility, and not the truckdrivers stationed at Shawneetown, Illinois.

The investigation disclosed that during the organizational meeting held on November 1, International Representative Anderson advised the employees that the Petitioner intended to challenge the truckdrivers who were based in Shawneetown, Illinois,[4] and who did not receive the same payroll checks as the other employees. During the discussion of such challenges, one employee expressed his desire that the truckdrivers not vote because he thought they would not vote for the Petitioner. All three witnesses who heard this comment state that Anderson made it clear to those present, that the truckdrivers were to be challenged because they were not stationed at the Employer's facility and did not receive the same payroll checks, rather than, because they were not expected to vote for the Petitioner. In addition, the Employer failed

4. Shawneetown, Illinois is located approximately 10 miles from the Employer's facility.

to present and the investigation failed to adduce evidence that the employee alleged to have made the above-referred to statement did so by virtue of any instructions or authorization from the Petitioner.

All witnesses interviewed state that they did not hear Anderson say that the truckdrivers would be challenged because they were not expected to vote for the Petitioner.

In these circumstances, the undersigned concludes that the announced intention to challenge and its challenge of certain truckdrivers does not provide a basis upon which the election may be set aside.

Accordingly, the undersigned recommends that Objection 4 be overruled.

Objection 5

In its fifth objection, the Employer alleges that Petitioner through its agents and representatives coerced employees in their selection of a bargaining agent, created an atmosphere of fear and interfering with the conduct of the election. In support of Objection 5, the Employer specifically contends that its supervisory employees William Lynch, Ernest Lynch and Robert Thrasher solicited and obtained signatures on authorization cards in support of the Petitioner; and that William Lynch, on November 1, the day immediately preceding the representation election, transferred employee Mary Lee Buckman from her normal work location, to the warehouse because she did not support the Petitioner.

The investigation disclosed that William Lynch is in charge of the Poly Line with 12 to 14 employees and the Corn and Oil Line with approximately 7 employees, both of which are in the production department. The entire production department, consisting of approximately 40 em-

ployees, is under the general supervision of Production Manager Charles Lee. William Lynch's work duties include keeping the lines stocked with raw materials and performing any required maintenance on the machines used on the Poly Line and Corn and Oil Line, and occasionally, on machines used in other areas of the facility.

In support of its contention that William Lynch is a supervisor, the Employer presented Plant Manager Charles J. McGuire, who stated in a sworn statement, that although Lynch does not have the independent authority to hire or fire employees, he possesses and exercises the authority to: effectively recommend the hiring of job applicants; effectively recommend the choice of employees to be laid off at times of decreased production; independently assign not only intra-departmental transfers, but also inter-departmental transfers; independently discipline employees with verbal warnings and reprimands; effectively recommend discipline of employees which may affect their terms or conditions of employment; independently assign and direct the work of employees in the Poly Line and Corn and Oil Lines; independently adjust employee grievances; effectively recommend when overtime work is needed; and independently determine and effectively recommend as to the employees to be assigned such overtime. McGuire also states that Lynch punches a timeclock and receives the same fringe benefits as other employees, but that Lynch is paid $2.55 per hour while the hourly rate of other employees on the production line ranges from $1.60 to $1.90 per hour.

William Lynch, in his sworn statement, denies that he possesses or exercises the authority ascribed to him by Plant Manager McGuire. Lynch further states that as a machine maintenance man, his duties consist of performing the necessary repair work on the machinery and keep-

ing the employees "busy" with work. He states that although on many occasions, he informs employees of their work assignments or transfers, he is merely a conduit for instructions from Production Manager Charles Lee to the employees.

Several other witnesses were interviewed concerning the supervisory status of Lynch, but their testimony also presents considerable conflict as to Lynch's authority, duties, and responsibilities. One witness stated that he and a relative were hired as a result of Lynch's recommendations, but this witness did not know to what extent Lynch's recommendations were considered by the Employer. One witness testified that Lynch only occasionally assigns transfers, but two other witnesses state that Lynch possesses and exercises such authority regularly. One witness states that Lynch verbally warns or reprimands employees on a regular basis and that employees have been disciplined by Production Manager Lee solely on the recommendation of Lynch and without Production Manager Lee conducting any independent investigation of such conduct warranting discipline. Another witness states that Lynch does verbally warn and reprimand employees, but only advises Production Manager Lee of any misconduct or poor work performance that Lee himself does not observe. Still another witness states that although he has not observed Lynch independently discipline employees, it is Lynch's responsibility to report any misconduct which may warrant disciplinary action to Production Manager Lee. Of eight witnesses interviewed, only one witness stated that Lynch assigns work without instructions from Production Manager Lee and that Lynch possesses and exercises the authority to recommend overtime and independently determine and assign employees' overtime.

With respect to the supervisory status of Ernest Lynch, the investigation disclosed that Ernest Lynch is in charge of the Presto Pop Line of the Employer's production department and which has approximately 12 employees. Lynch's work duties include keeping the line stocked with raw materials and performing any required maintenance on the machine used on the Presto Pop Line. As regards Ernest Lynch, Plant Manager McGuire states that Ernest Lynch has the identical duties, responsibilities, and authorities as described above for William Lynch, except that Ernest Lynch receives $2.35 an hour and he does not perform as much maintenance work on machines and equipment on his line.

Contrary to the Employer, Ernest Lynch, in his sworn statement, denies that he possesses or exercises the authority ascribed to him by Plant Manager McGuire, but states that on a few occasions over the past 8 years he has recommended the hiring of job applicants with whom he was personally acquainted. Lynch also states that when employees in the Presto Pop Line are engaging in misconduct or poor work performance, he talks to them and if they continue in such conduct, he so advises Production Manager Lee. Lynch further states that although, on many occasions, he informs the employees of their work assignments or transfers, he is merely a conduit for instructions from Production Manager Lee to the employees.

Of the several other employees interviewed, only one had knowledge of Ernest Lynch's supervisory status. This witness stated that although Lynch verbally disciplines employees and reports any recurring misconduct or poor work performance to Production Manager Lee, he (the witness) has not observed Lynch suspend or send home any employee and is not aware of the discharge of any employee as a result of Lynch's making such recommen-

dation to Production Manager Lee. This witness also states that Lynch assigns all intra-departmental or inter-departmental transfers only after he consults with Production Manager Lee.

In regard to the supervisory status of Robert Thrasher, Plant Manager McGuire states that Thrasher has the identical duties, responsibilities, and authorities as described above for William Lynch except that he, Thrasher, receives $2.20 an hour. Thrasher, however, in his sworn statement, denies that he possesses or exercises the authority ascribed to him by Plant Manager McGuire. Although all other proffered witnesses were interviewed concerning Thrasher's duties, none had any knowledge of Thrasher's supervisory status.

With respect to the organizational activities of William Lynch, Ernest Lynch, and Robert Thrasher, the investigation disclosed that in mid-August, as a result of their dissatisfaction over failure to receive requested wage increases, they and a few other employees decided to make attempts to obtain representation. Following several preliminary contacts, one of the employees telephoned the Petitioner on September 3. In response to their inquiries, the Petitioner forwarded approximately 92 authorization cards to an employee who received them on September 5. On September 6, the employee distributed the authorization cards equally between William Lynch, Ernest Lynch, and Robert Thrasher. That evening, after working hours, William Lynch and Robert Thrasher visited employees' homes and solicited signatures on the authorization cards, obtaining 20 to 25 executed cards. Nine witnesses interviewed stated in their respective sworn statements that William Lynch and Robert Thrasher solicited and obtained executed authorization cards for the Petitioner. William Lynch, Ernest Lynch, and Robert Thrasher, in their re-

spective sworn statements, all admitted continuing their efforts in support of the Petitioner's organizational campaign up to the day of the representation election. One employee witness states that William Lynch, Ernest Lynch, and Robert Thrasher were the principal union organizers.

Another witness states that on one occasion, William Lynch and Robert Thrasher approached her and Thrasher said:

> Now me and Bill have stuck our necks out for you women. I think you should back us up now and vote for the union.

As noted above herein, Thrasher also allegedly showed an employee a copy of a union contract between Petitioner and another employer.

With respect to the allegation that William Lynch transferred employee Mary Lee Buckman from her normal work location to the warehouse because she did not support the Petitioner, Lynch, Buckman, and two other witnesses were interviewed. Lynch, in his affidavit, states that he does not recall employee Buckman's transfer on November 1, that he does not possess or exercise the authority to transfer employees and, therefore, if employee Buckman were transferred, it was Production Manager Lee's decision. Employee Buckman, in her statement, states that she began her employment with the Employer on September 10,[5] that she had not been transferred to the warehouse prior to the election, but that it was not uncommon for women to be transferred there. Buckman and another employee witness also stated that the Corn and Oil Line was temporarily not in service on November 1, because of a shortage of oil, and, as a result, all

5. She also stated she had previously been employed by the Employer for approximately a 6 month period in 1969.

the employees on the line were transferred to various locations. All witnesses interviewed stated that it is not unusual for any employee to be transferred to the warehouse. The Employer did not present and the investigation failed to adduce any evidence that Buckman was transferred to the warehouse because she did not support the Petitioner.

The Employer did not allege other examples of conduct which could be characterized as supervisory restraint and coercion by William Lynch, Ernest Lynch or Robert Thrasher or present any evidence in support thereof, and the investigation failed to adduce any such evidence. Moreover, in evaluating the organizational activity of these three alleged supervisors, it must be noted that the Employer held meetings with its employees, showed a film about union strikes, distributed several pieces of pro-management literature, and otherwise conducted a vigorous campaign against the Petitioner.

The evidence disclosed by the investigation as to the supervisory status of William Lynch, Ernest Lynch, and Robert Thrasher, is in conflict. It is significant that the names of these three individuals were included by the Employer on the eligibility list submitted in this case, and that they voted unchallenged in the election. Without deciding the question of supervisory status, and assuming *arguendo* that William Lynch, Ernest Lynch, and Robert Thrasher are low level supervisors, the undersigned concludes, that their organizational activity does not provide a basis to set the election aside. While the investigation established that these individuals engaged in substantial union organizational activity, the investigation also established that these three individuals considered themselves part of the bargaining unit, that they voted unchallenged

in the election, and that in their advocacy of the union, their conversations and contacts with other employees were on an "employee to employee" basis, rather than as supervisors to subordinates. The investigation failed to disclose any evidence that employees were coerced into voting for the Petitioner out of fear of future retaliation by William Lynch, Ernest Lynch, or Robert Thrasher. Moreover, there is no basis for believing that fear of supervisory retaliation destroyed the employees' freedom of choice, because at best William Lynch, Ernest Lynch, and Robert Thrasher are merely low level supervisors whose opportunities for affecting employment status are clearly limited. As noted above, the investigation established that the Employer conducted a vigorous campaign against the Petitioner, thereby further removing the possibility of employee fear of supervisory retaliation as employees could recognize that any maltreatment or punishment by these alleged supervisors predicated on employee opposition to the union could be brought to the attention of higher management officials who share the employees' view on unionization. The undersigned concludes, therefore, that the organizational activities of William Lynch, Ernest Lynch, and Robert Thrasher did not impair the employees' freedom of choice in the election or constitute interference which would warrant setting aside the election. *Turner's Express, Incorporated,* 189 NLRB 106; *Stevenson Equipment Company,* 174 NLRB 865; Cf. *Montgomery Ward & Co., Incorporated,* 115 NLRB 645.

Accordingly, the undersigned recommends that Objection 5 be overruled in its entirety.

Objection 6

In its sixth objection, the Employer alleges that the Petitioner conducted a false election in an attempt to trick and confuse voters. During the investigation of the ob-

jections, the Employer failed to present evidence in support of this objection and acknowledged that it was mistaken about the Petitioner having conducted a "false election", and requested that this objection be treated as an allegation covering any conduct not specifically alleged which may be grounds for setting aside the election. The Petitioner denies that it engaged in any conduct which would constitute grounds to set aside the election.

Accordingly and as Objection 6 is unsupported by any evidence, the undersigned recommends that Objection 6 be overruled.

Objection 8

In its eighth objection, the Employer alleges that Petitioner's officials and agents maintained a position in the immediate proximity of the voting area, during the conduct of the election and talked with employees waiting in line to vote, thereby interfering with the conduct of the election. The Petitioner denies the allegations contained in Objection 8.

All witnesses interviewed denied, in sworn statements, any knowledge of such activity. The Employer failed to present, and the investigation failed to disclose any evidence of any persons remaining near the polling place and engaging in such activity. Objection 8, therefore, lacks merit.

Accordingly, the undersigned recommends that Objection 8 be overruled.

Objection 9

In its ninth objection, the Employer alleges that the Petitioner, through the misconduct of its representatives and agents, created an atmosphere of fear, which interfered with the employees' freedom of choice and the con-

duct of the election. Specifically, the Employer alleges that an agent of the Petitioner advised employees that the Employer was paying money to employees to vote against the Petitioner.

The investigation disclosed that on or about September 27, due to seasonal increases in orders and deliveries, the Employer leased three trucks and three drivers from leasing companies in Nashville, Tennessee, the location of the Employer's headquarters. The Employer does not pay these drivers their wages and has no control over them except to assign deliveries. One employee witness states that on the evening of November 1, the day before the representation election, he and one of the leased truckdrivers met at a local tavern and, after over 2 hours of drinking alcoholic beverages, had a discussion regarding the Employer paying money to employees to vote against the Petitioner. The employee states the truckdriver asked him "how (he) was going to vote in the election." Upon the employee answering, the truckdriver stated:

> I'll give you $20 to vote against the Union and $5 for every no vote you can get.

After the employee immediately advised that he did not want the money, the truckdriver stated that the employee would be much better off "if (he) voted no." The next day, prior to the representation election, the truckdriver advised the above-referred to employee that he did not mean what he said and that he "was just drunk," to which the employee replied that he "didn't believe him anyway." This employee was the only employee witness interviewed who stated that he had been offered money. Other employees deny that they had been offered money to vote for or against either the Petitioner or the Employer. However, three employees state that they heard a rumor that

an employee had been offered money to vote against the Petitioner. The Employer failed to present, and the investigation failed to adduce, any evidence that the truckdriver who allegedly made the statement did so under instructions or authorization from or on behalf of the Petitioner, or that the truckdriver indicated or implied to the employee that he was acting under such instructions or authorization.

In the circumstances disclosed herein, the undersigned cannot conclude that the statement, made by the truckdriver after some 2 hours of consuming alcoholic beverages in a local tavern, and upon sober reflection, repudiated the following day, constitutes any basis upon which the election may be set aside.

Accordingly, the undersigned recommends that Objection 9 be overruled.

Conclusions and Recommendations

Having recommended that the Employer's objections be overruled in their entirety, and the investigation having failed to disclose evidence of other conduct which constitutes grounds for setting aside the election, it is further recommended that a certification of representative issue designating the Petitioner as the exclusive collective-bargaining representative of the employees in the collective-bargaining unit involved herein.[6]

---

6. Under the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, exceptions to this report and recommendations may be filed with the Board in Washington, D. C., by filing with the Board eight copies of such exceptions. Immediately upon filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director of Region 14 of the National Labor Relations Board, Room 448, 210 North 12th Blvd., St. Louis, Missouri 63101. Exceptions must be received by the Board in Washington by January 2, 1974.

Signed at St. Louis, Missouri, this 17th day of December 1973.

/s/ Herman W. Glaser
Herman W. Glaser, Acting Regional Director
National Labor Relations Board, Region 14
Room 448, 210 North 12th Boulevard
St. Louis, Missouri 63101

EXHIBIT 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTEENTH REGION

CASE NO. 14-RC-7468

BLEVINS POPCORN COMPANY,
Employer,

and

AMERICAN FEDERATION OF GRAIN MILLERS,
AFL-CIO,
Petitioner.

OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF ELECTION OF NOVEMBER 2, 1973

Comes now the Employer, BLEVINS POPCORN COMPANY, through the undersigned counsel, and herewith files these Objections to the Election conducted by the Regional Director for the Fourteenth Region on November 2, 1973. The Employer objects to the conduct of the Election for the following reasons.

I.

The Union, through its representatives and agents, made misleading and substantial misrepresentations of fact to employees during union meetings, immediately before the election, at a time that precluded an effective reply by the Employer, thereby interfering with the conduct of the election.

II.

The Union, through its agents and representatives, misrepresented the contents and substantive terms of

American Federation of Grain Millers contracts, which terms were within the knowledge of the Union, thereby interfering with the conduct of the election.

III.

The Union, through its agents and representatives, made financial inducements to the employees by guaranteeing free insurance and other benefits to employees, if they voted for the Union.

IV.

The Union, through its agents and representatives, and immediately before the election, announced the challenging of ballots of employees who had been stipulated by the parties as eligible to vote, thereby creating confusion and interfering with the conduct of the election.

V.

The Union, through its agents and representatives, coerced employees in their selection of a bargaining agent, creating an atmosphere of fear and interfering with the conduct of the election.

VI.

The Union conducted a false election, in an attempt to trick and confuse the voters, thereby interfering with the conduct of the election.

VII.

The Union constructed a written contract and represented to the employees that its terms and conditions would be automatically given to employees, if they voted for the Union, thereby interfering with the conduct of the election.

VIII.

The Union officials and agents maintained a position in the immediate proximity of the voting area, during the conduct of the election and talked with employees waiting in line to vote, thereby interfering with the conduct of the election.

IX.

The Union, through the misconduct of its representatives and agents, created an atmosphere of fear, which interfered with the employees' freedom of choice and the conduct of the election.

By these and other acts and conduct, the union interfered with the employees' free choice of a bargaining representative or their right to decline same.

WHEREFORE, the Employer prays its Objections to the conduct of the results of the election be sustained and that a second election be conducted at a time deemed appropriate.

Respectfully submitted,

Bowling, Brackhahn & Jackson
By: /s/ W. Bruce Swain
W. Bruce Swain
By: /s/ Richard A. Brackhahn
Richard A. Brackhahn
Suite 1212 Clark Tower
5100 Poplar Avenue
Memphis, Tennessee 38137
Attorneys for the Employer

Dated: November 6, 1973

CERTIFICATE OF SERVICE

I, W. Bruce Swain, do hereby certify that I have on this 6th day of November, 1973, served four (4) copies of the foregoing Objections on Mr. Joseph H. Solien, Regional Director, National Labor Relations Board, Fourteenth Region, Room 448, 210 North 12th Boulevard, St. Louis, Missouri 63101, by certified mail, return receipt requested; and that further, I have served one copy on the following:

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International Representative
American Federation of Grain Millers, AFL-CIO
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Chicago, Illinois 60617 (CERTIFIED MAIL)

Mr. W. A. Robbins
President
Blevins Popcorn Company
Popcorn Village
Nashville, Tennessee 37202 (REGULAR MAIL)

Mr. Charles McGuire
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/s/ W. Bruce Swain
W. Bruce Swain

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-13

BLEVINS POPCORN COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

and

AMERICAN FEDERATION OF GRAIN MILLERS, AFL-CIO,

Respondents,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The American Federation of Grain Millers, AFL-CIO ("Union") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Blevins Popcorn Company ("Company").*

* The administrative agency involved herein, the National Labor Relations Board, shall be referred to as "Board".

QUESTIONS PRESENTED.

Whether the reviewing court, the U. S. Court of Appeals for the District of Columbia Circuit, properly reviewed the decision of the Board.

STATEMENT OF THE CASE.

On November 2, 1973 the employees in an appropriate bargaining unit at the Company's Ridgeway, Illinois facility voted in a Board conducted election to be represented by the Union by a vote of 41 to 18 (A. 20-21). The Company refused to recognize and bargain with the Union and instead filed timely objections to the election (A. 21). Pursuant to appropriate provisions of the Board's rules and regulations, the Regional Director "caused a full and complete investigation to be made of the objections" (A. 21) and assuming the facts as presented by the Company wherever necessary (e.g. A. 24, 28) recommended the Company's objections be overruled in their entirety and that the Union be certified as the collective bargaining agent (A. 42).*

The Company continued to refuse to recognize and bargain with the Union and instead filed an appeal to the Board from

* The Company's repeated reference to a so called "*ex parte*" investigation, if intended to be suggestive of some impropriety by the Board, is wholly inaccurate (Co. Brief, pp. 2, 21). As is clear from the Regional Director's Report on Objections and Recommendations, he considered all evidence and positions submitted by the Company and the Union (e.g. A. 21) and where necessary even assumed factual disputes in favor of the Company (e.g. A. 24, 28). Thus the Company cannot say that its full position was not taken and considered.

Further, it is clear there is no absolute right to a hearing on objections because such a hearing could be used only as a delaying tactic. *Amalgamated Clothing Workers of America* v. *N. L. R. B.*, 424 F. 2d 818, 828-829 (D. C. Cir. 1970); *N. L. R. B.* v. *Carolina Natural Gas Corporation*, 386 F. 2d 571, 574 (4th Cir. 1967); *N. L. R. B.* v. *Joclin Manufacturing Company*, 314 F. 2d 627, 631-632 (2nd Cir. 1963); *N. L. R. B.* v. *O. K. Van Storage, Inc.*, 297 F. 2d 74, 76 (5th Cir. 1961).

the Regional Director's report on objections (Pet. Brief 7). The Board ordered a hearing to be held on one of the Company's objections which resulted in a hearing officer's finding, approved on appeal by the Board, to overrule said objection. As a result the Union was certified as the bargaining agent (Pet. Brief 7).

The Company continued to refuse to recognize and bargain with the Union (A. 14), which resulted in the instant charge and a decision by summary judgment and a Board order that the Company bargain with the Union as the certified bargaining agent (A. 8-19).

The Company continued to refuse to recognize and bargain with the Union. The Union, contending that greater remedies than a mere bargaining order were necessary, filed a petition to review in the United States Court of Appeals for the District of Columbia Circuit. The Board intervened in those proceedings and filed a cross petition for enforcement of its bargaining order. The lower court by a per curiam decision denied the Union's petition for review and granted the Board's cross petition for enforcement (A. 7-8), later denying the Company's petition for rehearing (A. 6) and the Company's request for rehearing *en banc* (A. 5).

The Company continues to refuse to recognize and bargain with the Union pending its petition before this Court, although no request for a stay of the lower court's order has been sought. Therefore the Company now is arguably in contempt of the lower court's order.

ARGUMENT.

The Company contends that the lower court, the U. S. Court of Appeals for the District of Columbia Circuit, in this and other cases, misconceived the appropriate standards for judicial review of NLRB representation proceedings, and that the lower court's order is at variance with other Courts of Appeals. Neither contention is correct and review by this Court is totally unwarranted.

1. This Court has limited its own review of the review by the Court of Appeals recognizing that, ". . . Congress has charged the Court of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders". *South Prairie Construction Company* v. *Local No. 627, International Union of Operating Engineers, AFL-CIO, (N. L. R. B.),* ..... U. S. ....., 96 S. Ct. 1842, 1844 n. 5 (May 24, 1976); *N. L. R. B.* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502, 71 S. Ct. 453, 455 (1951).

The appropriate standard for judicial review of a Board order was established by this Court in *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 71 S. Ct. 456 (1951). In this case the lower court said:

> The Board's findings are supported by substantial evidence in the record taken as a whole. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951). This court also finds that the Board's order is otherwise free from legal error. (A. 8.)

Thus, it is quite clear that the lower court is fully aware of the applicable standards for review, and the Company's suggestion that the lower court failed to understand or apply the *Universal Camera* standards (Pet. Brief p. 10-13) is patently absurd. The lower court's second review of the record and denial of the Company's petition for rehearing *en banc*, Judge MacKinnon ruling otherwise, completely dispels any notion raised by the Company here that the lower court did not fully, fairly and accurately review the Board's order precisely as Congress mandated. Upon this record, and in consideration of this Court's limited review of lower courts' review of Board orders, the petition is unwarranted.

2. This Court has frequently recognized, "Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives." *N. L. R. B.* v. *Savair Manufacturing Company*, 414 U. S. 270, 276-277, 94 S. Ct. 495, 498-499 (1973) quoting *N. L. R. B.* v. *Wyman-Gordon Co.*, 394 U. S. 759, 767, 89 S. Ct. 1426, 1430 (1969) and further citing *N. L. R. B.* v. *Waterman S. S. Co.*, 309 U. S. 206, 226, 60 S. Ct. 493, 503 (1940).*

See also *N. L. R. B.* v. *Hearst Publications Inc.*, 322 U. S. 111, 64 S. Ct. 851 (1944) in which this Court said:

> Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's when the latter have support in the record. (322 U. S. at 130, 64 S. Ct. at 860.)

Indeed, in reviewing any Board action this Court has repeatedly cautioned, ". . . courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy" *N. L. R. B.* v. *Gullett Gin Co.*, 340 U. S. 361, 363, 71 S. Ct. 337, 339 (1950) quoting from *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 194, 61 S. Ct. 845, 852 (1941).

Specifically with respect to the Board's "wide discretion" in supervising elections for a collective bargaining agent under the Act this Court has recognized and approved the Board's practice ". . . that the Board does not 'police or censor propaganda used in the elections it conducts, but rather leave to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements.' Steward-Warner Corp., 102 NLRB 1153, 1158 (1953)" and that, "the Board tolerates intemperate, abusive and inaccurate statements made by the Union during attempts to organize employees." *Linn* v. *United Plant Guard Wkrs. of Amer., Local 114*, 383 U. S. 53, 59, 86 S. Ct. 657, 662 (1966). Further, this Court has recognized that the various Board Re-

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* The Company is patently incorrect to argue that *Waterman S. S. Company, supra,* is no longer valid (Pet. Brief, p. 11) because, as noted above, the *Waterman* case was cited approvingly by this Court in its recent *Savair* decision (414 U. S. 276-277, 94 S. Ct. 498-499).

gional Directors to whom the Board has delegated its powers in election proceedings have the same expertise and wide discretion as the Board. *Magnesium Casting Co.* v. *N. L. R. B.*, 401 U. S. 137, 91 S. Ct. 599 (1971).

Upon the foregoing authorities it is most clear that the lower court correctly performed its review function, and found the Board's rulings and that of its Regional Director to be supported by substantial evidence with due consideration to the wide discretion which Congress mandated to be with the Board and its Regional Difectors.*

3. The Company's efforts to show a conflict among the various lower courts is clearly without merit. No two cases are exactly alike and it is for the Board in each particular case, not the reviewing court, to view all the facts and apply its wide discretion to matters such as: the alleged misrepresentation, the opportunity to reply, the impact upon the voters and other proper considerations. *Linn* v. *United Plant Guard Wkrs of America, Local 114*, 383 U. S. 53, 60, 86 S. Ct. 657, 662 (1966). Seemingly similar facts in separate cases and arising in different contexts may properly result in different findings upon over all considerations which the Board in its discretion must determine. Therefore alleged different results do not indicate

* The Company's reliance upon *N. L. R. B.* v. *Savair, supra* (Pet. Brief, p. 10) is misplaced. In *Savair* this Court considered a Union's promise to waive initiation fees only for those who signed a union card before the NLRB election; employees who failed or refused to sign would be required to pay an initiation fee. (414 U. S. 273-274, 94 S. Ct. 496-497). The Court found this to be discriminatory as a matter of law, and thus outside of the Board's area of wide discretion. (414 U. S. 278-279, 94 S. Ct. 499-500). The case at bar does not involve the organizing tactic considered in *Savair* and more importantly there is no showing that any claim made by the Union here was other than a claim or promise available to all employees without regard to whether or not they supported the Union. Thus, employees rights to support or not the Union were always preserved and the Union's claims could be left "to the good sense of the voters" without any suggestion or fear of discrimination (383 U. S. 53, 60, 86 S. Ct. 657, 662).

any conflict among the lower courts, as suggested by the Company.*

This Court can easily see the Board's Regional Director's detailed and complete analysis of the Company's election objections (A. 20-47) later reviewed by the Board (A. 11, n. 2). Particularly, the Regional Director noted the highly relevant consideration that the Company also engaged in a very extensive pre-election campaign in which it made its position clear to employees as follows: (1) the Union, if successful, could not begin its negotiations with present benefits plus more, but "all present benefits are wiped out"; (2) the employees' benefits would depend upon, *inter alia,* "the company's bargaining strength in giving nothing or as little as possible"; (3) the Company is not required to sign a contract; and (4) the employees do not necessarily retain their present benefits and the Company would "start negotiations at the *lowest rock bottom possible*" (A. 27-28, emphasis original). Therefore, even from this sample it is quite clear that the Company effectively campaigned against what it now claims to have been objectionable misrepresentations by the Union (compare the foregoing with A. 21-25). Obviously the Regional Director, the Board and the reviewing lower court considered the Union's pre-election campaign in the context of the over all campaign by the Employer and

* The Union will not overburden this brief to distinguish each and all individual election cases cited by the Company, however any comparison to the case at bar will reveal substantial and material differences in the facts which warranted a different result. For example in one of the cases relied on by the Company, *Tyler Pipe Industries Inc.* v. *N. L. R. B.*, 447 F. 2d 1136 (5th Cir. 1971) an election was set aside by the court because of union statements which were found *by the Board* to be "gross exaggeration[s]", "deliberate" and "reprehensible" in the context of an agreement between the company and the union to not further campaign after a certain date, which agreement the union violated but the company observed. However, in *Tyler* the Board ordered the Company to bargain with the union. Those facts have absolutely no similarity to the facts here. Indeed, the lower court in *Tyler* cautioned that objectionable acts cannot be considered alone but the entire circumstances must be considered (447 F. 2d at 1142).

correctly determined that the election was fair, and that the voters could fully appraise all parties' campaign material. *Linn* v. *United Plant Guard Wkrs of America, Local 114, supra,* 383 U. S. at 60, 86 S. Ct. at 662.

Consistent with overwhelming precedent cited in paragraphs 1 and 2 above, the Board and its Regional Director properly exercised their broad discretion, viewing all the circumstances, to overrule the Company's objections.

CONCLUSION.

A Court of Appeals authority to review a Board order is limited and this Court's authority to review the lower court's review is more limited. The lower court's review was precisely correct upon the controlling authorities of this Court. In any event, the Board's order is correct as a matter of law and is supported by substantial evidence in the record taken as a whole.

Therefore, the Company's petition for certiorari should be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A7-A8) is not reported. The Board's decision and order (Pet. App. A8-A19) are reported at 218 NLRB 689. The Board's decision in the related representation proceeding (Pet. App. A20-A47) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A2) was entered on May 4, 1977. The petition for a writ of certiorari was filed on July 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly upheld the order of the National Labor Relations Board overruling petitioner's objections to the conduct of a representation election and directing petitioner to recognize and bargain with the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. 4-5.

STATEMENT

1. Pursuant to a representation petition filed by the American Federation of Grain Millers, AFL-CIO (the "Union"), the Regional Director of the National Labor Relations Board conducted an election among petitioner's production and maintenance employees (Pet. App. A20). The Union won the election by a vote of 41 to 18 (Pet. App. A21). Petitioner filed objections to the election. After an investigation the Board overruled the objections and certified the Union as the bargaining agent (Pet. App. A11, n. 2, A20-A43).

The Board's findings and conclusions respecting petitioner's objections were as follows:

a. Petitioner contended that the Union misrepresented to employees both that petitioner improperly was paying its portion of hospitalization insurance premiums out of the employees' pension and profit-sharing funds, and that the Union's proposed collective-bargaining contract would go into effect automatically if the Union won the election (Pet. App. A22). The Board concluded that, assuming *arguendo* that a Union agent made the statement regarding payment of insurance premiums, it "could

readily be recognized and evaluated by the employees as campaign propaganda and not based upon facts within any special knowledge of [the Union]" (Pet. App. A24). Similarly, the Board concluded that employees were not misled by the representation that a contract would go into effect automatically, because they "are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining" (Pet. App. A28). In support of its conclusion, the Board noted that petitioner had distributed a booklet during the campaign that stated specifically that no contract would automatically go into effect if the Union won the election, since petitioner was not required to agree to any demands made by the Union (Pet. App. A27-A28).

b. Petitioner contended that the Union gave financial inducements to employees by guaranteeing free hospitalization insurance and by paying employees to vote for the Union (Pet. App. A28-A29). The Board found no evidence that employees were paid or offered money to vote for the Union (Pet. App. A30). The Board also found that, although one employee stated that a Union representative indicated that the employees would receive free insurance if the Union won the election, that statement was contrary to the recollection of many other employees. Some recalled a discussion of "free" insurance that would come out of dues deductions, while others recalled that free insurance had always been considered a benefit to be bargained for (Pet. App. A29-A30). The Board concluded that the evidence did not support the charge that the Union promised the employees free insurance (Pet. App. A30).

c. Petitioner contended that supervisory employees coerced employees into supporting the Union (Pet. App. A32). The Board found that the employees accused of this

conduct were not supervisors (Pet. App. A11, n. 2), and that, in any event, their conduct did not warrant setting aside the election (R. 89-91).[1]

d. Petitioner contended that the Union's challenge to some truckdrivers' eligibility to vote created confusion among the employees and thus interfered with the conduct of the election (Pet. App. A30-A31). The Board rejected this contention: the Union had made clear that the truckdrivers' eligibility was challenged because they worked at a different location than the employees in the voting unit (Pet. App. A31-A32).

2. Petitioner refused to bargain with the Union after the Board had certified it. The Union complained to the Board and an unfair labor practice proceeding was initiated, at which petitioner reiterated its objections to the election. The Board ruled that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the Act (Pet. App. A8-A14) and ordered petitioner to bargain with the Union upon request (Pet. App. A17). The court of appeals enforced the Board's order, concluding that the Board's findings "are supported by substantial evidence in the record taken as a whole" and that "the Board's order is otherwise free from legal error" (Pet. App. A7-A8).

ARGUMENT

Petitioner's principal contention (Pet. 10-11) is that the court of appeals applied an erroneous legal standard in reviewing the Board's order. In particular, petitioner asserts (Pet. 11) that the court considered that the determination whether an election is fair is "entrusted to the Board alone"—language taken from an earlier decision of the

[1]"R." refers to the materials contained in the "Volume IV, Pleadings" in the court below. A copy has been lodged with the Clerk of this Court.

court (*National Labor Relations Board* v. *Mar Salle Inc.*, 425 F. 2d 566, 570 (C.A.D.C.)). The court did not mention *Mar Salle* in its decision in this case, however, or indicate in any respect that it was abdicating its responsibility meaningfully to review the Board's order.[2] Rather, in concluding (Pet. App. A8) that "substantial evidence in the record taken as a whole" supported the Board's ruling that the Union conduct assailed by petitioner did not interfere with employee free choice in the election, the court properly applied the standard of review set forth in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474. The court's ruling turns upon the particular facts of this case and does not warrant further review. Moreover, the Board's conclusion is in accord with settled principles. See *National Labor Relations Board* v. *Golden Age Beverage Co.*, 415 F. 2d 26, 30 (C.A. 5); *National Labor Relations Board* v. *Red Bird Foods, Inc.*, 399 F. 2d 600, 602 (C.A. 7).[3]

[2]Indeed, although the court in *Mar Salle* did state (quoting from *National Labor Relations Board* v. *Waterman Steamship Co.*, 309 U.S. 206, 226) that the "control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone," it did not stop there. Rather, it went on to review the reasons that the Board gave in rejecting the employer's election objections and to satisfy itself that there was "substantial evidence in the record to indicate that the Board properly applied" its election criteria and that the "actions complained of could not reasonably have been expected to have a significant impact on the outcome of the election." *National Labor Relations Board* v. *Mar Salle Inc.*, *supra*, 425 F. 2d at 570-571.

[3]Contrary to petitioner's assertion (Pet. 13-19), the decision below does not conflict with that of any other court of appeals. Each of the other decisions petitioner cites, like the present case, turned upon the facts; none invoked a standard of review different from that followed by the court below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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